Supreme Court, U.S.
FILED

02 319 AUG 26 2002

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No. _____

In The Supreme Court of the United States

DONTE PITT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED

The Petitioner Donte Pitt stands convicted of several narcotics charges and one (1) count of use of a handgun during the commission of a drug offense. He is serving a sentence of 300 months imprisonment imposed by the United States District Court for the District of Maryland. The post-conviction action arose from indisputably perjurious testimony by Johnny St. Valentine Brown, at that time a law enforcement officer in the District of Columbia, who was the Government's expert narcotics witness at trial. Brown falsely testified that he was a licensed pharmacist. He also testified to other deliberate falsehoods, including the amount of his formal education, his name, his job title and position with the District of Columbia police department and his role as a congressional aide. His credentials were essential to the jury in evaluating his critically incriminating and uncorroborated testimony on the manufacture, preparation, and distribution of cocaine base essential to Mr. Pitt's convictions.

The District Court dismissed Mr. Pitt's due process claim arising from Brown's trial perjury and his ineffective assistance of trial counsel claims without conducting an evidentiary hearing. The Fourth Circuit affirmed the dismissal.

The questions presented are:

1. To resolve a split between at least three circuit courts of appeal when undisputed perjurious testimony of a law enforcement officer is presented to a jury, should knowledge of the false testimony of the law enforcement officer be imputed to the prosecution,

requiring that a conviction be set aside if there is any reasonable likelihood that the false testimony affected the jury's verdict?

2. Where material facts are in dispute between the parties in a post-conviction action pursuant to 28 U.S.C. Section 2255, involving an issue of ineffective assistance of trial counsel, may a district court dispense with an evidentiary hearing and rely on documents in the court record to find an affidavit submitted by the Government more credible than an affidavit supplied by a defendant?

PARTIES TO THE PROCEEDING

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The unreported opinion of the United States District Court for the District of Maryland, filed on August 31, 2001, by Williams, D.J., (hereinafter "Memo. Op."), denying post-conviction relief without conducting an evidentiary hearing, is reproduced in Appendix A (App. 1a-28a).

The unreported opinion of the United States Court of Appeals for the Fourth Circuit affirming the denial of post-conviction relief is reproduced in Appendix B (App. 29a-30a). This opinion denied the application for leave to appeal from the district court by an unpublished per curiam decision dated March 22, 2002, which denied the application "on the reasoning of the district court."

The unreported opinion of the United States Court of Appeals for the Fourth Circuit filed on May 29, 2002, denying the motion for rehearing and rehearing en banc is reproduced in Appendix C (App. 31a-32a).

Previously, on direct appeal, on January 22, 1999, the United States Court of Appeals for the Fourth Circuit affirmed Mr. Pitt's original convictions and sentences in an unpublished per curiam opinion, No. 97-4220, 1999 U.S. App. LEXIS 855. Following the Fourth Circuit's decision, Mr. Pitt filed a timely petition to this Court for issuance of a writ of certiorari on April 21, 1999, which this Court denied on June 1, 1999, 526 U.S. 1151.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing and rehearing en banc was filed on May 29, 2002. This petition is filed within 90 days of the Fourth Circuit's denial of the rehearing, as required by Rule 13(3) of the Rules of the Supreme Court. Therefore, jurisdiction is proper pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides as follows. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be derived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides as follows. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner, Donte Pitt, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit. The jury was sworn and trial began on October 15, 1996. The charges related to two separate sets of evidence: alleged proof of a large scale narcotics trafficking operation, charged in counts one to three, and separately, proof of one transaction allegedly involving a swap of guns for money and drugs, during the time period of the charged conspiracy, charged in counts four through seven. On November 4, 1996, Petitioner was found guilty on all counts which went to the jury.

The District Court's sentence of 300 months incarceration was imposed on May 28, 1997. The Government dismissed count five prior to sentencing.

This post-conviction action arose from indisputably perjurious testimony by Johnny St. Valentine Brown, a law enforcement officer, who served as the Government's expert narcotics witness at trial. Brown falsely testified that he was a licensed pharmacist. He also testified to other deliberate falsehoods, including the amount of his formal education, his name, his job title and position with the District of Columbia police department and his role as a congressional aide. His

credentials were essential to the jury in evaluating his critically incriminating and uncorroborated testimony on the manufacture, preparation, and distribution of cocaine base essential to Mr. Pitt's convictions.

After trial and direct appeal, investigation showed that Brown's credentials as an expert were fabricated. Memo. Op. at 6 (App. 7a) ("Mr. Brown was not a licensed pharmacist . . . [He] did not have a bachelor's, master's and doctorate degrees from Howard University"). He testified falsely on other matters as well. *See* Ex. 6 to New Trial Memo (Affidavit of Investigator James Bradley):

1. Brown's name. *See also* Ex. 9 To New Trial Memo (repeated reference to Johnny V. Brown, not Johnny St. Valentine Brown).

2. His job title and position with the D. C. police department. *See also* Ex. 3 to New Trial Memo at P.6 (rehired as senior police officer); letter to Williams, D.J. dated June 21, 2001, from Appellant's Counsel (providing further proof of false statements regarding job status).

3. His role as a Congressional aide.

On February 10, 2000, St. Valentine Brown entered a plea of guilty to perjury in the United State District Court for the District of Columbia for making willfully false statements about his expert credentials while under oath. Valentine Brown was later sentenced to a period of incarceration, and then received another sentence after admitting that he had submitted fabricated character letters to the sentencing court in mitigation of sentence. The Section 2255 Motion was timely filed and dismissed without an evidentiary hearing by

the Memo. Op. noted above. A timely notice of appeal followed, and the application for a certificate of appealability was denied as noted above. Thereafter, a motion for rehearing and rehearing en banc was denied by the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

Two important issues arising from the Due Process clause's applicability to federal criminal proceedings and post-conviction proceedings merit review of this case. First, this Court has not clearly addressed the circumstances in which the knowledge of a law enforcement officer is attributed to prosecutors in determining whether prosecutors knowingly presented perjured testimony to the jury in a federal criminal case, which has led to a split in the circuits which should be resolved by this Court. Second, this Court has not fully addressed the circumstances in which a district court is entitled to dispense with an evidentiary hearing in a post-conviction proceeding conducted pursuant to 28 U.S.C. Section 2255 on a claim of ineffective assistance of trial counsel and reach conclusions as to credibility on disputed issues of material fact based solely on documents in a district court's record.

A. To Resolve a Split Among the Circuits, This Court Should Find That When There is Undisputed Perjurious Testimony of a Law Enforcement Officer Placed Before a Jury, Knowledge of the False Testimony of the Law Enforcement Officer Must be Attributed to Prosecutors in Determining Whether a Jury Verdict Was Affected By Trial Perjury

The weight to be given perjured testimony in evaluating the integrity of a jury's verdict is a matter of exceptional importance. False testimony by a law enforcement officer knowingly offered by the Government undermines the very foundation of our criminal justice system. Here, the false testimony of the Government's expert, knowledge of which should be imputed to the prosecutors, barred the jury from fairly evaluating the evidence before it. This Court has not clearly addressed the circumstances in which the knowledge of a law enforcement officer is attributed to prosecutors in determining whether prosecutors knowingly presented perjured testimony to the jury in a federal criminal case. In the absence of clear authority from this Court, a split has arisen among the circuits on this issue. Since the integrity of a jury's verdict goes to the heart of the fairness of criminal proceedings, the

degree to which knowledge of false testimony should be attributed to the prosecution is an important issue this Court should address.

This Court has long held "that a conviction obtained by knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976)(citing numerous prior cases so holding); *Kyles v. Whitley*, 514 U.S. 419, 433 n. 7 (1995)(quoting *Agurs* but noting that this Court would not decide whether trial testimony involved perjured testimony as issue was not before the Court).

In contrast to the materiality test applicable to trial perjury, the test applicable to the mere nondisclosure of exculpatory evidence is harder for a defendant to meet to entitle him or her to a new trial: the defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)(quoting from *Bagley*).

The consequences of the distinction between cases involving perjury and mere non-disclosure are substantial. Materiality involving perjured testimony is the same as a showing that "suppression of the evidence was not harmless beyond a reasonable doubt." *Strickler v. Green*, 527 U.S. 263, 299 (1999)(Souter, J., dissenting). The "reasonable probability" standard that applies to the failure to disclose exculpatory evidence is obviously much higher and requires more substantial proof to obtain a new trial.

The substantial distinction between the two standards focuses as a threshold matter on whether the prosecution knowingly offered perjured testimony. This Court has not clearly addressed in cases involving undisputed perjured testimony by a law enforcement officer that is submitted to a jury, whether the police officer's knowledge is attributed to the prosecutor in determining whether the prosecution knowingly offers perjured testimony. In an early case, this Court heard a case where "the undisclosed evidence demonstrat[ed] that the prosecution's case include[d] perjured testimony and that the prosecution knew, or should have known, of the perjury." *United States v. Agurs*, 427 U.S. 97, 103 (1976)(discussing *Mooney v. Holohan*, 294 U.S. 103, 110-114(1935)). In other cases, this Court has not further developed the knew or should have known standard in the trial perjury context.

The absence of any controlling authority from this Court has led to a split in authority among the courts of appeal. *See Smith v. Massey*, 235 F.3d 1259, 1272 (10th Cir. 2000)(noting split between Fourth, Fifth, and Tenth Circuits). *Smith* correctly noted that the Fourth Circuit, which affirmed the erroneous finding of the district court in this case, attributes a law enforcement witnesses' knowledge to the prosecution in determining whether the prosecution permitted perjured testimony to be heard by the jury. *See Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998). Indeed, in this case the Fourth Circuit failed to follow its own precedents. On the other hand, *Smith* noted that the Fifth and Tenth Circuits refuse to impute the knowledge of a law enforcement witness to the prosecution in determining whether the

prosecution offered perjured testimony. *See Smith v. Sec'y of New Mexico Dep't of Corrections*, 50 F.3d 801, 831 (10th Cir. 1995); *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990). The Fourth Circuit applied the "reasonable likelihood" trial perjury standard in *United States v. Kelly,* 35 F.3d 929, 933-934 (4th Cir. 1994).

In contrast to its silence regarding attribution of knowledge to prosecutors in perjury situations, this Court has held that knowledge of the police is attributed to the prosecution in deciding whether prosecutors withhold exculpatory evidence. The prosecution is held accountable for exculpatory evidence known only to the police which is not provided to defense counsel. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999)(quoting from *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). This Court has not clearly extended this same principal of attribution from cases involving the non-disclosure of exculpatory evidence to trial perjury of a law enforcement officer.

As a result, in cases such as Mr. Pitt's, where there is no evidence that the prosecution knew of the law enforcement witnesses' perjury, but there is no doubt that the witness perjured himself, courts do not have clear guidance as to which standard to apply. Perhaps in the absence of clear authority from this Court, the District Court's Memo. Op., adopted by the Fourth Circuit in this case, did not apply the proper standard of review of materiality applicable to cases involving perjurious testimony knowingly offered by the prosecution. Instead, the District Court denied relief applying the standard of review applicable to a different type of action from a 28 U.S.C., 2255 Motion, a Motion

for New Trial based on newly discovered evidence. This standard requires relief only if the newly discovered evidence would probably result in acquittal at a new trial. Memo. Op. at 5 (App. 6a), citing *United States v. Chavez*, 880 F.2d 788, 792 (4th Cir. 1989); *see also* Memo. Op. at 16-17 (App. 20a-21a) (failing to cite to or apply the trial perjury standard set forth in *Agurs* and *Kyles*).

Furthermore, as noted by Justice Souder in his dissent in *Strickler*, the *Agurs* and *Kyles* trial witness perjury materiality standard is essentially one of harmless error. A reviewing court must find whether it is clear beyond a reasonable doubt that a rational jury would have found the defendants guilty without the error. The District Court did not apply this standard.

Instead, the District Court, and the Fourth Circuit by its adoption of the District Court's analysis, found that the "[d]efendant still would have been convicted on the basis of overwhelming evidence against him produced before the Court." Memo. Op. at 16 (App. 20a). Neither the District Court nor the Fourth Circuit applied the necessary "beyond a reasonable doubt" standard.

Furthermore, the District Court's related factual finding and legal conclusion, affirmed by the Fourth Circuit, that "based upon the pervasive evidence present against petitioner at trial, even if Brown's testimony was discounted the jury's judgment would not have been different in any way," Memo. Op. at 16 (App. 20a), also failed to apply the "beyond a reasonable doubt" standard. This legal conclusion was irrelevant to the *Strickler/Agurs* reasonable likelihood standard as well as clearly erroneous.

The difference in the standard of review applied by the District Court and the Fourth Circuit, and the proper standard is significant. In reaching its conclusion, the District Court relied on the evidence that drug trafficking occurred in the residence which Mr. Pitt entered from time to time. The District Court ignored the fact that Johnny St. Valentine Brown's testimony alone connected Mr. Pitt to the drug trafficking in the residence. Brown's testimony that Mr. Pitt's fingerprints were found on items used to manufacture crack cocaine alone connected Mr. Pitt to the drug processing in the residence. Brown connected the physical evidence, including contraband and fingerprints, found in a search, to Mr. Pitt's alleged high-level drug trafficking, through his supposed expertise as a pharmacist.

For example, the Government offered extensive testimony that large quantities of baking soda boxes and kilogram cocaine wrappers were found in the residence, and offered fingerprint evidence that Mr. Pitt handled the baking soda boxes and a plastic bag with cocaine residue. Without Brown's testimony on how crack is made, 10/25/96 T. 50-51, including a discussion of the detailed chemical processes, and how baking soda is an essential part of cocaine base production process as it is the poor man's free base kit, 10/25/96 T. 49, the jury would not have heard any testimony that items Mr. Pitt touched in the residence were used to manufacture narcotics or were directly involved in the drug trade.

Without his testimony, the Government's evidence would have shown at most that Mr. Pitt was merely present in the residence where drugs were found, rather than shown that he was a narcotics trafficker. With

fingerprint evidence that Mr. Pitt touched substances, such as baking soda and a plastic bag with crack residue, used, according to testimony solely provided by Brown, to produce or package crack, a mere presence or personal possession defense was untenable at trial.

Johnny St. Valentine Brown was also the only Government witness to testify that the quantities of drugs in the residence were consistent with distribution, not personal possession. 10/25/96 T. 16-18, 32-34, 48. Brown testified that anyone possessing drugs in the quantities found in the search of the residence "would be a wholesale distributor and if they're dealing in street weights, they would be a wholesale/retail distributor." 10/25/96 T. 48. This fact was an essential element of proof. The fact that distribution level amounts of drugs were found in the residence did not automatically connect Mr. Pitt to those narcotics absent Brown's testimony.

The fact that the District Court correctly found that Brown's testimony was unnecessary to show that someone, not necessarily Mr. Pitt, who used the residence was engaged in large scale drug trafficking, Memo. Op. 2-3, 6-7,16-17 (App. 2a-4a, 7a-8a, 20a-21a), does not also show, as the District Court mistakenly assumed, that Mr. Pitt was personally involved in the drug trafficking or promoted or supported misuse of the residence for drug dealing. Only Brown, the perjurer, made that connection in his testimony. Thus, the standard of review matters here.

Applying the proper standard of review would also alter the District Court's finding that despite Brown's perjury that the jury would have credited his testimony

based on his so called street experience. Memo. Op. at 6,17 (App. 7a-8a, 20a-21a). Cross examination of Brown regarding his lengthy history of perjurious testimony in hundreds of cases regarding his credentials, amount of formal education, his name, and job history would have eliminated his value as a witness on any issue of relevance to the trial In light of his bald face lies about his education and licenses, his credibility based on his street experience as an undercover agent and supervisor would have been zero, even assuming his pharmacology background would have been of little consequence to his street experience.

In summary, Brown's testimony was absolutely critical to the Government's proof. Among other things, charges could not have gone to the jury without his testimony that the evidence seized at the residence showed distribution of narcotics by Mr. Pitt, not personal possession. Brown's perjury requires a new trial because there is a reasonable likelihood that the perjury affected the jury's judgment. Furthermore, had the perjury been disclosed, the result of the proceeding would have been different. The result of the proceeding with the undisclosed and unremedied perjury is fundamentally unfair and unreliable.

The District Court for the District of Columbia ordered a new trial in a narcotics case in which Brown perjured himself on the same issues he perjured himself in this case. *See United States v. Jones*, 84 F. Supp. 2d 124 (D.D.C. 1999). "Brown's testimony filled in all the gaps of the government's case and was clearly material to the jury's determination." *Id.* Here as in *Jones*, Brown's lies require relief.

B. This Court Should Provide Clear Guidance to Lower Federal Courts Regarding the Circumstances in Post-Conviction Proceedings Pursuant to 28 U.S.C. Section 2255 in Which an Evidentiary Hearing Can be Dispensed With and A Credibility Determination Relying Solely on Competing Affidavits Can be Made Addressing an Ineffective Assistance of Trial Counsel Claim

Rule 4 of the Rules Governing Section 2255 Proceedings permit a district court to dismiss a motion for relief pursuant to Section 2255 "[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court." This Court has held that summary dismissal is appropriate only when the "allegations, when viewed against the [court] record [are] so palpably incredible [or] so patently frivolous or false as to warrant summary dismissal." *Blackledge v. Allison*, 431 U.S. 63, 75-76 (1977). If summary dismissal is not appropriate, the Rules Governing Section 2255 Proceedings provide that the district court "shall order the United States attorney to file an answer or other pleading . . . or to take such other action as the judge deems appropriate." Rule 4(b) of the Rules Governing Section 2255 Proceedings.

Once the Government responds, the district court "shall . . . determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates." Rule 8 of the Rules Governing Section 2255 Proceedings. The Rules Governing Section 2255 Proceedings require hearings when material facts are in dispute. *See* Rule 8, Advisory Committee Note (referencing Rule 8 of Section 2254 Rules); Rule 8 of Rules Governing Section 2254 cases, Advisory Committee Note (citing to and relying on *Townsend v. Sain*, 372 U.S. 293, 312 (1963)). "Numerous cases have held that the Government's answer and affidavits are not conclusive against the movant, and if they raise disputed issues of fact a hearing must be held." Section 2255 Proceedings Rule 5 Advisory Committee Note.

The strong preference for hearings arises from the doctrine that a direct appeal is not a suitable means to litigate ineffective assistance of trial counsel claims so that when such claims are brought in post-conviction proceedings no showing of cause and prejudice is required. *See, e.g., United States v. Brown*, 183 F.3d 740, 743 (8th Cir. 1999)(requiring ineffective assistance of counsel claim to be brought in post-conviction proceedings). In the absence of a record to review pertaining to ineffective assistance, a hearing on disputed issues of material fact is particularly necessary.

This Court should decide whether, after requiring the Government to respond, a district court is entitled to make a credibility finding and deny relief, on an ineffective assistance of trial counsel claim, without

conducting an evidentiary hearing based on the record before the Court. In theory, an evidentiary hearing is required where a motion alleges facts which if proved entitle a defendant to relief, *see Hill v. Lockhart*, 474 U.S. 52, 60 (1985), *Blackledge v. Allison*, 431 U.S. 63, 82-83 (1977), summary dismissal is not appropriate, and the motion and any supporting documentation raise a material issue of fact requiring, among other things, a credibility determination. Despite these principals, in a great many cases, this case included, district courts make credibility determinations which preclude evidentiary hearings based on documents in the record despite disputes regarding material facts.

There are numerous cases reversing the denial of a Motion to Vacate Sentence Under 28 U.S.C. § 2255 where a District Court refused to hold an evidentiary hearing even though the material facts were in dispute. *Gallego v. United States*, 174 F.3d 1196 (11th Cir. 1999)(rejecting Magistrate-Judge's finding that defendant's sworn testimony contradicting his attorney's testimony was insufficient to require relief where court made no credibility determination but instead "based the decision on that fact that defendant's allegations were unsubstantiated and . . found as a matter of law that defendant could not carry his burden without presenting some evidence in addition to his own word"); *Rodriguez v. United States*, 286 F.3d 972, 986 (7th Cir. 2002)(finding that district court "had sufficient information, based on its observations, the record, and the law, to determine that [the defendant] had received effective assistance of counsel" and deferring to finding of trial judge on need for hearing); *Castillo v. United*

States, 34 F.3d 443, 445-446 (7th Cir. 1994)(adversarial hearing required where court heard testimony from witness for only one party); *Solis v. United States*, 252 F.3d 289, 294 (3rd Cir. 2001)(Section 2255 "requires the District Court to hold a hearing sua sponte when, as here, the files and records do not show conclusively that [the defendant] was not entitled to relief"); *Koskela v. United States*, 235 F.3d 1148 (8th Cir. 2001)(hearing required where district court "concluded, without an evidentiary hearing, that the [defendants'] affidavits lacked credibility in the face of the government's pleadings and affidavits").

As has been the result in so many other cases, a sample of which are noted above, the district court below in this case failed to conduct an evidentiary hearing on disputed issues of material fact relating to the effectiveness of trial counsel's representation. If credited, Mr. Pitt's affidavit which concerned matters outside the court record as to plea negotiations and his Section 2255 Motion seeking relief on that and other bases, required relief. The District Court denied relief without conducting a hearing by crediting letters from trial counsel to Government counsel, while established case law required a hearing to permit the District Court to make such determinations.

Credibility determinations cannot be decided based on affidavits without live testimony. Thus, since the Government provided the District Court with affidavits from prior counsel disputing that they were ineffective and disputing Mr. Pitt's sworn statement alleging trial counsel's ineffectiveness, there was a material question of fact requiring a hearing, even under controlling

Fourth Circuit precedent. "When a colorable Sixth Amendment claim is presented, and where material facts are in dispute involving inconsistencies beyond the record, a hearing is necessary." *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992); *Moore v. United States*, 950 F.2d 656, 661 (10th Cir. 1991)("A hearing is necessary because of the need to consider extra-record facts concerning counsel's representation") (cited by *Magini*); *Becton v. Barnett*, 920 F.2d 1190, 1192 (4th Cir. 1990)(addressing pre-AEDPA Section 2254 petition and ordering hearing)(cited in *Magini*); *see also United States v. Marcum*, 16 F.3d 599, 603 n.4 (4th Cir.) (commenting that "resolving ineffective assistance claims ordinarily requires an evidentiary hearing"), *cert. denied*, 513 U.S. 845 (1994).

However, here the District Court erroneously denied all of the ineffective assistance of counsel claims without conducting a hearing, despite disputed questions of material fact. Mr. Pitt provided the District Court with a sworn affidavit addressing the advice he received regarding a guilty plea offer made by the Government. Mr. Pitt stated that he rejected the plea offer because defense counsel advised him orally that there was a substantial risk that the Court would impose a sentence based on the more than 500 kilogram amount of cocaine consistent with the wrappers found in the residence, notwithstanding the absence of a stipulation or proof to that effect in the plea agreement. *See* Petitioner's Ex. 6 to Section 2255 Motion. Eventually, even after a contested jury trial, the Court did not impose a sentence on the drug counts in this case (Counts 1-3) based on the number of wrappers.

The Government responded with affidavits from counsel contesting Mr. Pitt's claims. *See* Gov't Opp. filed Oct. 5, 2000. The District Court, and by adoption the Fourth Circuit, held on the affidavits alone that the Government claims were more persuasive. Memo. Op. at 13 (App. 15a) ("this Court believes it is clear from the record's documentation of correspondence between trial counsel and the Government, that trial counsel had performed adequately in attempting to negotiate a plea agreement").

This was not a case where, assuming the truth of the Mr. Pitt's ineffective assistance of counsel claims, the District Court found that each and every ineffective assistance of counsel claim was inadequate as a matter of law. Such a conclusion would not be merited. A defendant is entitled to adequate representation regarding plea offers. Thus, for example, on a related point, habeas relief is merited where trial counsel fails to accurately advise a defendant about the legal consequences of his plea of guilty, to the defendant's prejudice. *See Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996)(advice on rejected plea held constitutionally deficient), *cert. denied*, 521 U.S. 1118 (1997); *Turner v. State of Tennessee*, 858 F.2d 1201, 1205 (6th Cir. 1988)(counsel misadvised defendant to reject plea offer), *vacated on other grounds*, 492 U.S. 902 (1989); *Beckham v. Wainwright*, 639 F.2d 262, 265-266 (5th Cir. 1981); *see also Williams v. State*, 326 Md. 367, 378 (1992)(collecting federal and state cases). The same analysis should apply to a rejected plea offer induced by ineffective assistance of counsel, which was the allegation made by Mr. Pitt in this case, both in his

pleadings and in his sworn Affidavit. The remedy for failure to accept a plea offer is a vacated conviction followed by entry of a plea of guilty and acceptance of the previously rejected plea offer. *Turner*, 858 F.2d at 1207-1209, or in the alternative, re-sentencing to a sentence which would have been imposed had the plea offer been accepted. *Boria*, 99 F.3d at 498-499.

Here, the District Court implicitly made a credibility determination based on the papers that trial counsel was effective in presenting the plea offer made by the Government to Petitioner and advising him thereon, a conclusion which was unwarranted and inconsistent with the principals of summary judgment and fair practice in federal court. The Fourth Circuit's error in affirming the denial of relief without conducting an evidentiary hearing, despite serious disputed issues of material fact, is common and widespread. Mr. Pitt's allegations in the Section 2255 motion, and in his separate affidavit, presented "a substantial showing of the denial of a constitutional right," 28 U.S.C. Section 2253, which combined with disputed material facts, required the trial court to hold an evidentiary hearing on Mr. Pitt's claim of ineffective assistance of trial counsel claims.

CONCLUSION

For the foregoing reasons, Petitioner Donte Pitt respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

DONTE JAVON PITT,	*	
	*	
Petitioner,	*	
	*	**Civil No.**
vs,	*	**AW-00-1566**
	*	
	*	**Criminal No.**
	*	**AW-96-0036**
UNITED STATES	*	
OF AMERICA,	*	
	*	
Respondent	*	
	*	

MEMORANDUM OPINION

Presently before the Court are Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, Motion for New Trial based on Newly Discovered Evidence, Motion for Discovery under 28 U.S.C. § 2255, Motion to Amend Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, and Motion for Partial Summary Judgment on perjury and *Apprendi* Claims. The Government has filed a Response to a number of Petitioner's motions. Subsequently, Petitioner submitted a Reply to the Government's Response. The Court has

reviewed the entire record, including the criminal proceedings as well as the pleadings and record with respect to the instant motion. No hearing is deemed necessary. (*See* Local Rule 105.6 (D.Md.)). As a preliminary matter, the Court will grant Petitioner's Motion to Amend Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. §2255. The Court has reviewed the pleading in conjunction with the entire record in rendering a decision on the remaining motions.

For the reasons set forth below, this Court will deny Petitioner's Motions for New Trial based on Newly Discovered Evidence, Motion for Discovery under 28 U.S.C. §2255, Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. §2255, and finally, Petitioner's Motion for Partial Summary Judgment on perjury and *Apprendi* Claims.

BACKGROUND

On March 25, 1995, three Prince George's County police officers responded to a burglar alarm in Temple Hills, Maryland. (Gov't Resp. to Pet'r's Am. Mot. at 1.) After detecting the smell of natural gas, the officers called the local fire department for assistance and upon their arrival, the firefighters and officers entered the residence in order to alleviate the exigent circumstances. *Id.* Upon entering the house, the officers observed a white powdery substance, crystallized rocks that appeared to be crack cocaine, a gun, an electric scale, and several boxes of baking soda, which is used in the production of crack cocaine. After seeking and

procuring a search warrant, the government confiscated, numerous documents, 16 trash bags containing 512 kilogram cocaine wrappers, 202 empty baking soda boxes, 77 zip-lock baggies with cocaine residue, 178.9 grams of cocaine base, 363.4 grams of cocaine HCL, a safe, two semi-automatic handguns, and approximately $2,000 in cash. *Id.* at 2. On March 28, 1995, after securing a search warrant for the safe, the government found two additional kilograms of cocaine HCL, three semi-automatic handguns, and approximately $300,000 in cash. *Id.* The Temple Hills residence was leased to a "Robert Watson," however, Watson was in fact an alias used by Donte Pitt, the Petitioner, whom was the chief resident of the home in question.[1] *Id.*

On February 5, 1996, the Petitioner was charged with two counts of possession, intent to distribute cocaine, and possession of a firearm by a convicted felon. (*See* Pet'r's Mot. at 2.) On March 25, 1996, in connection with several other residences maintained by

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[1] The assertion that the "Robert Watson" was in fact Petitioner, Donte Pitt, and that Petitioner was the primary occupant of the residence is based on evidence including two of the guns seized being linked to Petitioner through a crack for gun trade, Petitioner's fingerprints found on a number of items seized from the residence, these items including boxes of baking soda and a large zip-lock bag containing crack cocaine residue. (Gov.'s Resp. to Pl.'s Mot. at 2-3.) Furthermore, the handwriting on the lease and alarm system application, that of "Robert Wilson," matched Petitioner's, two witnesses who provided household services at the Temple Hills address, made out-of-court identifications of Petitioner, the telephone service of the residence was in the name of Petitioner's sister, and the password to the alarm system was the name of Petitioner's mother. (*Id.* at 3.)

the Petitioner, he was charged with five additional counts of conspiracy to distribute and possession with the intent to distribute cocaine, distribution of cocaine, and use of a firearm during a drug trafficking offense. *Id.* Petitioner entered pleas of not guilty to all the charges. *Id.*

During the course of the trial, the Government called Metropolitan Police Department Detective Johnny St. Valentine Brown as an expert witness with regards to the street drug trade. (Gov't Resp. to Pet'r's' Am. Mot. at 4.) Mr. Brown was qualified as a witness through the presentation of his credentials; a board-certified pharmacist with several degrees from Howard University, a consultant for the Metropolitan Police Department, and his role as a Congressional aide. (Pet'r's Mot. at 12-13.) Moreover, Mr. Brown had also been with the Metropolitan Police Department for twenty-six and a half years. ((Gov't Resp. to Pet'r's Am. Mot. at 4.) (*citing* Tr. at 9, October 25, 1996.)) In this capacity, Mr. Brown amassed considerable experience as an intelligence investigator, and spent twenty-one years as a member of the narcotics and investigations division, which included a five year stint as a drug investigator where he worked undercover, coming into direct contact with narcotic buyers, users, and sellers approximately five to six hundred times. ((Gov't's Resp. to Pet'r's Am. Mot. at 4-5.) (*citing* Tr. at 10, October 25,1996.)) Mr. Brown further testified to his participation in various schools offered by the DEA, U.S. Customs, Council of Governments, Health and Human Services, and the National Institute of Drug Abuse, further providing him with assistance and

knowledge in drug identification, and the understanding of trafficking patterns, manufacturing processes, and chemical structures. ((Gov't Resp. to Pet'r's Am. Mot. at 5.) (*citing* Tr. at 11-12, October 25, 1996.)) Mr. Brown subsequently testified to the entire scope of the drug industry; including typical characteristics of those involved, giving an insight into the lives of drug dealers and distributors, and describing among other procedures of the industry, the use and conditions of stash houses, security systems, guns, alias, communication devices, and preventing a paper trail. ((*See* Gov't Resp. to Pet'r's Am. Mot. at 5-6.) (*citing* Tr. at 34,36-39, 100, 103, October 25, 1996.)) Finally, Mr. Brown testified to the procedures and use of baking soda and a microwave oven in the manufacturing of crack cocaine. ((*See* Gov't Resp. to Pl.'s Am. Mot. at 5-6.) (*citing* Tr. at 50, October 25, 1996.))

On November 4, 1996, Petitioner was convicted on all counts; cocaine base conspiracy (21 U.S.C. § 846), two counts of possession with intent to distribute cocaine base (21 U.S.C. § 841), distribution of cocaine base (21 U.S.C. § 841 (a)), two counts of use of a handgun during a drug trafficking crime (18 U.S.C. § 924(c), and unlawful possession of a handgun by a convicted felon (18 U.S.C. § 922(g)). (Pet'r's Mot. at 2.) During the sentencing hearing, on May 28, 1997, the Court rejected the government's request to find that over 1.5 kilograms of cocaine base were attributable to the defendant, and adopted the recommendation of the presentence report. ((Gov't Resp. to Pet'r's Am. Mot. at 7.) (*citing* Tr. at 107-108, 125, May 28,1997.)) Consequently, Petitioner was sentenced to 300 months

incarceration, followed by ten years of supervised release. (Pl.'s Compl. at 2.)

Subsequently, Petitioner appealed the District Court's ruling to the United States Court of Appeals for the Fourth Circuit. (Pet'r's Mot. at 3.) On January 22, 1999, the Fourth Circuit affirmed the District Court's decisions, approving the warrantless search of the Temple Hills residence, and the trial court's denial of a mistrial request based on unusual and prejudicial outside contact with the jurors during the case. *United States v. Pitt*, No. 97-4420, slip op. at 2 (D. Md. January 22,1999.)

Following the Fourth Circuit's decision, on April 21, 1999, Petitioner appealed to the United States Supreme Court for issuance of a writ of certiorari which the Supreme Court denied on June 1.1999. *Id.*

DISCUSSION

II. Petitioner's Motion for New Trial based on Newly Discovered Evidence and Motion for Partial Summary Judgment on Perjury and *Apprendi* Claims.

Petitioner has requested this Court to grant a new trial based upon newly discovered evidence pursuant to Fed. Rule Crim. Proc. 33. Rule 33 states in pertinent part that "the court may grant a new trial...if the interests of justice so require." A five part inquiry has been adopted by the Fourth Circuit when determining whether a new trial should be granted: (1) Is the evidence, in fact, newly discovered; (2) Are facts

alleged from which the court may infer due diligence on the part of the movant; (3) Is the evidence relied upon not merely cumulative or impeaching; (4) Is the evidence material to the issues involved; and (5) Would the evidence probably result in acquittal at a new trial? *United States v. Chavis*, 880 F .2d 788, 792 (4th Cir.1989). To warrant a new trial, the answer to each of the five questions must be in the affirmative. *Id. See United States v. Lofton*, 233 F .3d 313 (4th Cir.2000); *United States v. Mosley*, 178 F.R.D. 470,472 (W.D.Va.1998).

Petitioner's argument is that the Government's narcotics trafficking expert, Johnny St. Valentine Brown, perjured himself during trial regarding his previous work experience and his qualifications. In the Summer of 1999, during trial preparation of an unrelated case, it was discovered the Mr. Brown was not a licensed pharmacist, as he had held himself out to be. Furthermore, Mr. Brown did not have a bachelor's, master's and doctorate degrees from Howard University as he had previously stated. On February 10, 2000, Mr. Brown entered a plea of guilty to multiple perjury counts in the United States District Court for the District of Columbia for making willfully false statements about his expert credentials while under oath. Without Mr. Brown's testimony, according to Petitioner, the Government would have been unable to secure a guilty verdict from the jury during trial. Petitioner believes that Mr. Brown's credentials, as stated to the jury, as well as his testimony regarding Petitioner's drug activities were instrumental in obtaining a guilty verdict.

Mr. Brown's false credentials must be considered in light of the entire case. Mr. Brown was a longtime member of the District of Columbia Metropolitan Police Department, in the narcotics division. Furthermore, Mr. Brown had spent time as a detective. Therefore, Mr. Brown certainly had street knowledge and experience that would be useful to a jury in a drug trafficking case. Furthermore, Mr. Brown's testimony was not the only evidence linking the Petitioner to the crime. The jury heard several witnesses corroborate that not only was there an excessive amount of narcotics discovered in the house, but there was also large amounts of cash typical for drug trafficking, drug manufacturing components and ingredients, scales, loaded firearms, 500 kilogram wrappers, drug residue, laden plastic bags, and other perfunctory drug distribution and production devices. Based upon the entirety of the Government's case, this Court does not believe that Mr. Brown's lack of degrees from Howard University and failure to be a pharmacist would have put the "whole case in such a different light as to undermine confidence in the verdict." *Spicer v. Warden*, 31 F.Supp.2d 509, 519-520 (D.Md. 1998), *aff'd in part and rev'd in part on other grounds*, 194 F.3d 547 (4th Cir.1999). The Court believes that even without Mr. Brown's testimony, there was ample evidence to convict Petitioner. Additionally, the Court questions whether Mr. Brown's false credentials constitutes "newly discovered evidence." The record shows that Mr. Brown's credentials were given to Petitioner prior to his testifying. However, no evidence has been presented to this Court showing that Petitioner's counsel could not have had time to investigate the authenticity

of Mr. Brown's credentials during trial preparations. The same opportunity to investigate Mr. Brown's credentials existed for the Petitioner as it did for the defendant in the unrelated case in the District Court for the District of Columbia. The argument can be made that Mr. Brown's shaky background could have been discovered prior to trial through due diligence on the part of both Petitioner and the Government.

The Petitioner's argument for a new trial must fail because this Court cannot affirmatively answer questions one and five as enumerated under the *Chavis* inquiry. Therefore, this Court will deny Petitioner's Motion for a New Trial based on Newly Discovered Evidence. As a corollary to Petitioner's argument. a Motion for Partial Summary Judgment on the Perjury and *Apprendi* Claims has been filed. This motion will be denied by the Court, as well. As previously discussed, Mr. Brown's perjury plea does not entitle Petitioner to a new trial as a matter of law. Additionally, Petitioner's *Apprendi* claims must fail because the doctrine does not apply retroactively to cases on collateral review. (This issue is addressed more fully by the Court in Section III(b)(6) of this Memorandum Opinion).

III. Petitioner's Motion for Discovery under 28 U.S.C. §2255

Petitioner is seeking to have discovery taken on the additional issues of: (1) the Government's knowledge of Petitioner's drug trafficking at the time of the first search at the Weldon Drive property; (2) the FBI's

report of Investigation of threats made against the jury; and (3) all documents regarding Johnny St. Valentine Brown. The Supreme Court, in *Harris v. Nelson*, 394 U.S. 286, 299-300 (1969), stated that post-conviction discovery can be allowed by the court where, "specific allegations before the Court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally, and therefore entitled to relief." In other words, Petitioner must make a good cause showing for the court to allow post-conviction discovery. The Court will deny Petitioner's Motion for Discovery. The Court believes that Petitioner's request is cumulative of the relief he has already sought from this Court. As discussed with regards to Petitioner's Motion for a New Trial and discussed below in reference to Petitioner's §2255 motion, this Court has concluded that Petitioner is not confined illegally, and that the facts are already fully developed. Because Petitioner has not shown good cause, the Court will deny the Motion for Discovery under 28 U.S.C. §2255.

IV. Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. §2255

A. Standard

The Sixth Amendment protects one's right to effective assistance by counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063 (1984). Petitioner claims that he was convicted due to a number of instances of ineffective assistance of counsel.

Falling within the parameters of 28 U.S.C. § 2255 claim, this Court must consider whether it can entertain this claim of ineffective assistance of counsel. However, when a constitutional claim is not raised at trial or on direct appeal it generally results in a waiver of that claim, unless "cause and actual prejudice" are shown. *United States v. Frady*, 456 U.S. 152, 164-167, 102 S. Ct. 1584, 1594-1596 (1982). However, one who raises an ineffective assistance claim for the first time in a section 2255 motion does not have to pass muster under *Frady*, but need only satisfy the less stringent two-pronged test set forth in *Strickland*. *United States v. King*, 36 F. Supp. 2d 705,708 ((E.D. Va. 1999) (*aff'd* 120 F.3d 263 (4th Cir. 1997)). Additionally, determining counsel's assistance defective, so as to warrant a reversal of conviction involves the two-part *Strickland* test. *Strickland*, 466 U.S. at 687; *See also Roach v. Martin*, 757 F.2d 1463, 1476-1477 (4th Cir. 1985).

First, Petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* In other words, because there is a prevailing presumption that counsel's conduct is reasonably competent, *Strickland*, 466 U.S. at 689 "the defendant must show that counsel's representation fell below an objective standard of reasonableness," *Id.* at 688, being that " [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

Secondly, "the [Petitioner] must show that the deficient performance prejudiced the defense. . .[being]

so serious as to deprive the [Petitioner] of a fair trial." *Id.* Thus, the appropriate test for "prejudice" being "[Petitioner] claiming ineffective assistance of counsel must show that 'counsel's representation fell below an objective standard of reasonableness' and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *United States v. DeTemple*, 162 F.3d 279, 289 (4th Cir. 1998) (*quoting Strickland*, 466 U.S. at 694.) A reasonable probability being that which is sufficient to undermine the confidence in the judgment. *Id.* The mere possibility that the outcome would have been different does not suffice. *Hoots v. Allsbrook*, 785 F.2d 1214. Additionally, when making a determination of "prejudice" in an ineffectiveness claim, this Court "must consider the totality of the evidence before" because some errors will have different effects on the evidentiary picture. *Strickland*, 466 U.S. at 695-696. Therefore, a record such as the one before this Court with overwhelming record support is less affected by errors than would be a weakly supported case. *Id.* at 696.

B. <u>Petitioner's claims</u>

Petitioner, in his motion to vacate his sentence sets forth six claims; (1) ineffective assistance of counsel, (2) conviction obtained without due process of law is violation of the Fifth Amendment; (3) Prosecution closing arguments violated due process; (4) Denial of the right of confrontation requires a new trial; (5)

conviction obtained in violation of the right not to be compelled to testify; and (6) Collateral attack on conviction and *Apprendi*. The Court will take up each claim, *seriatim*.

1. Ineffective Assistance of Counsel

Petitioner's claim is that his attorney's assistance was ineffective and has laid out twenty-two allegations within his ineffective assistance of counsel claim. In order to prevail on his claim of ineffective assistance of counsel, Petitioner must show (a) that counsel's representation fell below an objective standard of reasonableness (the performance component). This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel guaranteed to Defendant by the Sixth Amendment, and (b) that there is a reasonable probability that, but for counsel's ineffectiveness, the result of the case or his fate would have been different." (the prejudice component). *Strickland v. Washington*, 466 U.S. 668, 669 (1984). "Unless a defendant makes both showings, it cannot be said that the conviction. . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687. "Judicial scrutiny of counsel's performance must be highly deferential. . . A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 669. The mere

probability that the result would have been different will not suffice. *Hoots v. Allasbrook*, 785 F.2d 1214, 1220 (4th Cir. 1986).

Turning to the case at bar, and viewing the entire record, this Court believes that the allegations of trial counsels' errors, do not justify relief under §2255. Many of the Petitioner's allegations of ineffective assistance of counsel can be refuted as trial tactics or trial strategy by counsel. Other allegations, if viewed as unsound trial strategy, are clearly isolated, insignificant and not prejudicial when you view then in the context of the entire evidence against Petitioner. While most of the twenty-two (22) allegations of ineffective assistance of counsel can be denied without discussion, the Court will address a few of the claims.

The first allegation involves trial counsels' failure to move prior to trial, to suppress the results of the search of the Temple Hills residence.[2] (Pet'r's Am. Mot. at 4.) This allegation is without merit. Trial counsel did in fact move to suppress evidence seized in the Temple Hills search at trial, which was denied. Furthermore, counsel unsuccessfully appealed this Court's decision to the Fourth Circuit. This Court believes it mattered not whether trial counsel moved prior to, or at trial to suppress the Temple Hills search because either way the "police officers, [were] clearly justified by exigent circumstances, for the purpose both of determining if a

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2 An ancillary issue was that Petitioncr lacked standing to suppress the search prior to trial, however, it is not necessary to delve into that issue because it is a moot point considering with or without standing the search was legal and the evidence was admissible.

burglar was inside and of rescuing any individuals inside from the suspected gas leak," *Pitt*, No. 97-4420, slip op. at 5 (footnote omitted). Therefore the search and its resulting evidence were admissible.

A second allegation proffered by Petitioner is ineffective assistance of counsel with regards to negotiating and advising Petitioner of possible plea agreements and sentences he could receive. (Pet'r's Am. Mot. at 7.) Petitioner claims that "[t]rial counsel inadequately advised [him] regarding the possible sentence he would receive following entry of a plea of guilty in response to the Government's two plea offers." (Pet'r's Am. Mot. at 7.) Additionally, Petitioner implies that trial counsel failed in adequately negotiating a plea agreement with the Government. *Id.* The Government on the other hand has presented evidence indicating Petitioner was fully advised of the penalties, whether he chose to plea or go to trial and face sentencing. (*See* Robinson Aff. at 1; *See also* Garber Aff. at 2-3.) There is no indication in the record that trial counsel attempted to persuade Petitioner in choosing either course. In fact, "[t]he decision of whether or not to accept a plea bargain is the sole province of the accused in a criminal case, and counsel is under an "affirmative duty" to avoid placing undue influence on that decision," *King*, 36 F. Supp. 2d at 708 (*aff'd* 120 F.3d 263 (4th Cir. 1997)) (*citing Jones v. Murray*, 947 F.2d 1106, 1111 (4th Cir. 1991)). Even more so, the standards of professional conduct issued by the American Bar Association only require that defense counsel "advise the client of the alternatives available and of considerations deemed important by defense counsel or the defendant in

reaching a decision." *Jones*, 947 F.2d at 1110 (*quoting* ABA Crim. Justice Std. 14-3.2 (2d ed. 1986)). Finally, with regards to trial counsel attempting to secure the most favorable plea agreement for Petitioner, this Court believes it is clear from the record's documentation of correspondence between trial counsel and the government, that trial counsel had performed adequately in attempting to negotiate a plea agreement. Consequently, from the evidence found in the record, this Court believes Petitioner was fully and adequately represented and advised by trial counsel with regards to his plea negotiations and agreement.

Petitioner sets forth a number of allegations within the ineffective assistance of counsel with regards to failing to subpoena certain witnesses and the use of evidence. (Pet'r's Am. Mot. at 8-11.) However, the Fourth Circuit having addressed this issue previously, has stated:

> Absent a showing that the tactical decision of counsel was so unreasonable in light of the need for the testimony that it amounted to a deprivation of an attorney who acted within "the range of competence demanded of attorneys in criminal cases," we are reluctant to second guess the tactics of trial lawyers.

Goodson v. United States, 564 F.2d 1071, 1072 (4 th Cir. 1977) (*quoting McMann v. Richardson*, 397 US 759, 771, 90 S. Ct. 1441, 1449 (1970)). Furthermore, the Court must be convinced with reasonable probability

that the testimony sought by Petitioner would have actually changed the trial's outcome. *See Strickland* 466 U.S. at 694. With these standards in mind, the Court must determine whether the failure to call two witnesses to rebut the Government's evidence equates to ineffective assistance of counsel. However, after examining the record, it is this Court's view that regardless of the testimony of these witnesses, the overwhelming mound of evidence presented by the Government would not have been refuted to the extent of altering the final outcome.[3] Lastly, Petitioner also alleges that his counsel's permitting the government to use the court file was ineffective assistance of counsel because the government produced evidence showing the file had been tampered to help the defense. Again, this Court disagrees with Petitioner's assertion that this single factor would have caused the jury to alter its verdict.

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[3] David Hughes had testified at Petitioner's sentencing hearing, where he testified to the same set of facts that were presented at the trial. (Tr. at 59-61, 63, 68, 70-72, May 28. 1997.) Therefore, with no reason to believe new information would be discovered, it is this Court's view, that Mr. Hughes' testimony would have had no effect on the outcome of the trial.

Daniel Brown's testimony had previously been determined unreliable by this Court, (Tr. at 182, October 31, 1996.) and based upon his disappearance from the courthouse, prior to his taking the stand, and that he was later convicted of a felon in possession charge relating to the same firearms transaction as the jury convicted Petitioner, this Court believes it would have been doubtful that Mr. Brown's testimony would have been given much credence to rebut the government's evidence.

It is further alleged that the failure of defense trial counsel to object to specific statements made by the prosecutor denied Petitioner due process, and violated his Sixth Amendment right to effective assistance of counsel. Petitioner contends that three statements made by the Assistant United States Attorney (AUSA) during the government's summation violated, (1) Petitioner's right not to testify, by suggestive commentary that there was evidence to which the "defense had no explanation;" (Pl.'s Am. Cmpl. at 11 (*quoting* Tr. at 45-46.)) (2) that the AUSA made an improper statement as to the appearance of evidence; (Pet'r.'s Am. Mot. at 11-12.) and (3) that the AUSA had made disparaging comments of defense counsel and Petitioner (Pet'r's Am. Mot. at 12.) all three of which, petitioner posits, predisposed the jury as to Petitioner's guilt. In dealing with such issues as raised by Petitioner, the United States Supreme Court has "recognized, it 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471 (1986), (*quoting Darden v. Wainwright*, 699 F. 2d 1031,1036 (1983)). With this in mind "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* at 181 (*quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871 (1974). Turning to the case at bar, Petitioner contends that the trial was unfair because the AUSA remarked in his summation that the "defense had no explanation." This Court disagrees with Petitioner's argument that such a statement necessarily suggests Petitioner himself

was obligated to explain the evidence. It is quite plausible that the AUSA was commenting on the evidence Petitioner actually presented. Yet, assuming there was an improper mischaracterization, Petitioner's allegations themselves do not "suggest that the comments were more than merely isolated and only minimally prejudicial," *Id.* at *4, (*citing United States v. Odom*, 736 F.2d 104, 117-18 (4th Cir.1984)). In fact the Fourth Circuit, has held that this is not a sufficient reason for reversal. *Id.* at *4-*5. Regarding the failure to object to a statement of how the AUSA perceived a piece of evidence, this Court considers such allegation to be without merit as it fails to show any prejudicial effect. *See Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir 1997). Furthermore, this Court believes that a failure to object in this instance constitutes a completely reasonable trial strategy. *See id.* To determine the inappropriateness of comments made during closing argument, the comments must be viewed in the context of the entire argument. Moreover, the Fourth Circuit has ruled that "the 'closing argument of the prosecutor must be considered in the light of the previous arguments of defense counsel in order to determine whether there was provocation for what the prosecutor said.'" *United States v. Parzynski*, 915 F.2d 1566 (4th Cir.1990), (*quoting United States v. Hoffa*, 349 F.2d 20, 50 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966)). As the Government contends, and this Court agrees, "there was ample provocation for the Government's comments during closing argument," (Gov.'t Resp. to Pet'r's Am. Mot. at 40.) and being such provocation, this Court believes that the Government's statement that the

"defense had no explanation" was harmless.

2. Conviction Obtained Without Due Process of Law. is A Violation of the Fifth Amendment

Defendant contends that Detective Brown gave perjured testimony and therefore violated Petitioner's Fifth Amendment right to a fair trial. He was not a licensed pharmacist and had no authority to distribute narcotics by prescription. He further asserts that without Detective Brown's testimony there would have been no proof of distribution or possession, and no connection between Pitt and drug trafficking. This Court however finds that Detective Brown's testimony was not imperative to Defendant's conviction on counts one through three. Even if his testimony was completely discounted, the Court believes Defendant still would have been convicted on the basis of overwhelming evidence against him produced before this Court Furthermore, based upon the pervasive evidence present against petitioner at trial, even if Brown's testimony was discounted the jury's judgment would not have been different in any way. *Doepel v. United States*, 434 A.2d 449, 459 (D.C. 1981). "Defendant not entitled to new trial based on newly discovered evidence that FBI serologist lied about his academic credentials where substantial independent evidence established Defendant's guilt." *See United States v. Morrison*, 991 F.2d 112 (4th Cir. 1993). "The quantity of cocaine itself was sufficient to infer that

distribution was intended." (*quoting United States v. Roberts*, 881 F.2d 95, 99 (4th Cir. 1989) (quantity too large for personal consumption may be inferred to be for distribution.) As previously stated, this Court finds that several witnesses corroborated that not only was there an excessive amount of narcotics discovered at the house, but there was also cash, crack manufacturing components and ingredients, scales, loaded firearms, 500 kilogram wrappers, crack residue laden plastic bags, and other perfunctory drug distribution and production devices. Thus, in light of such heavy evidence in this case, Brown's testimony was not necessary to sustain a conviction on drug possession and distribution counts. Furthermore, there was testimony that Detective Brown was a long time member of the Metropolitan Police Department narcotics division, and any expertise the Detective accumulated was based largely on his experience on the streets of Washington, D.C. as a law enforcement officer. Thus, his academic credentials, and background in pharmaceuticals were not critical in regard to his substantive knowledge and ability to competently offer valid learned opinions. *Harris v, United States,* 33 F.3d 54, No. 93-6472,1994 U.S. App. WL 416265 at *2 (6th Cir. Aug. 18, 1994.) "The fact that Mr. Glowacki [government's key expert witness] was not truthful about his college degree in management had no material effect on petitioner's conviction." Thus, Petitioner's claim that Mr. Brown's perjury violated his Fifth Amendment right to a fair trial, must fail.

3. Prosecutor's Closing Arguments

Violated Due Process

Defendant contends that Government's summation at trial was full of uncontested errors that prejudiced Defendant and are cause for vacating the judgment. Defendant's first argument is that the AUSA violated his Fifth Amendment Constitutional right, through his suggestive commentary that there was evidence to which the "defense had no explanation." (Pet'r's Mot. at 42.) As indicated earlier, it is quite possible that this statement was viewed in connection with the evidence actually presented by Petitioner. Nevertheless, the Court will assume, that the Government's argument improperly implied that Defendant had an obligation to explain the evidence. Notwithstanding, the Court does not find reversible error in this case. In *United States v. Cruz*, 797 F.2d 90, 93 n.1 (2nd Cir. 1986), the prosecutorial misconduct alleged was that an attorney muttered the inflammatory one-dimensional phrase, "the defense. . .has to convince you." Even though this language is clearly violative of the Fifth Amendment, the court held that, "While this phrasing is indefensible, we will not lightly overturn a conviction solely on the basis of a prosecutor's misstatement in summation." The Fourth Circuit has denied prosecutorial misconduct claims based on language similar to the language in the case at bar. *See Gaskins v. McKellar*, 916 F.2d 941, 951 (4th Cir. 1990) (finding no prosecutorial misconduct in saying the Government's evidence was undisputed because Defendant could have contradicted the evidence without testifying) *cert. denied*, 500 U.S. 961 (1991).

Furthermore, Defendant asserts that the prosecutor 'testified to Mr. Pitt's prejudice' when he held an exhibit during summation and stated that "I'll submit to you that to me looks like it's dated sometime in November of 1994," (11/1/96 Tr. 52). Defendant, also asserts this as a ground for ineffective assistance due to his attorney's failure to object. However, again this Court finds that counsel's decision not to object, might well be views as a reasonable trial strategy so as not to appear to be entering frivolous objections. Defendant, therefore, has failed to meet his burden and his claim must fail.

4. Denial of the Right of Confrontation Requires a New Trial

Defendant asserts that his right to confront witnesses was denied and therefore entitles him to appropriate post conviction relief. The Court's Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination. The first category reflects the Court's longstanding recognition that the "literal right to 'confront' the witness at the time of trial. . .forms the core of the values furthered by the Confrontation Clause." *California v. Green*, 399 U.S. 149,157,90 S.Ct. 1930,1934,26 L.Ed.2d 489 (197). In this category, Defendant argues that this Court permitted Mr. Hughes' hearsay explanation to a Government agent (later recanted) about Mr. Pitt's role in identifying the photograph of Watson. (Pet'r's Mot. at 49.) This Court, however, finds that this evidence was

admitted on the ground that it was being offered not for the truth of the matter asserted, but rather to rebut the implication that the officers erred by focusing their investigation on Pitt, rather than on other individuals. Therefore, the restrictions that the Confrontation Clause places on the "range of admissible hearsay," are not called into play. Similarly, this case falls outside the second category, for this Court did not limit the scope or nature of defense counsel's cross-examination in any way. Accordingly, this Court holds there was no denial of Defendant's right under the Confrontation Clause and his allegation must fail.

5. Conviction Obtained in Violation of Fifth Amendment Right Not to be Compelled to Testify

Defendant contends that it is improper for the Government to comment on his silence prior to arrest. In support of the argument, he quotes *Griffin v. United States*, 380 U.S. 609 (1965). "Government may not comment on defendant's failure to testify." and argues that the AUSA violated Petitioner's Fifth Amendment Constitutional right, through suggestive commentary that there was evidence to which the "defense had no explanation." While this statement can be viewed as language that violates the Fifth Amendment, it is not a sole basis to overturn a conviction solely on the basis of a prosecutor's improper or misstatement in summation. *United States v. Francis*, 82 F .3d 77, 78 (4th Cir. 1996) (government's statement during closing that 'the evidence is uncontradicted' was not an improper

comment on the accused's failure to testify); *United States v. Jenkins*, 544 F.2d 180, 180-81 (4th Cir. 1976) (read in context, a statement that testimony was 'uncontradicted' was not 'manifestly' intended to be, nor was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.") (*quoting United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973)).

In the present case, this Court does not find the AUSA's language with respect to "no explanation" in any way implicated Defendant as guilty for not testifying. Neither does the Court find that Detective Brown's affirmative response to the Government's questions concerning the fact that drug dealers often decline to answer questions by law enforcement officers constitute an improper or prejudicial comment on Petitioner's rights to remain silent. Therefore, this claim under the Fifth Amendment must fail.

6. Collateral Attack on Convictions and *Apprendi*

Relying on *Apprendi*, Defendant now claims that this Court's sentence was unconstitutional because the jury neither had evidence of the quantity of drugs with which he was charged nor found him guilty of distributing and possessing with intent to distribute over two kilograms of cocaine and approximately 179 grams of cocaine base. In *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury, and proved beyond a reasonable doubt." This Court finds that prior to *Apprendi*, it was a well settled position, that the drug quantity involved in an offense was a factor to be determined by a preponderance of the evidence by the sentencing court. *See, e.g., United States v. Powell*, 886 F.2d 81, 85 (4th Cir. 1989) (amount of drugs involved in a drug offense relevant only to the sentence imposed, not guilt.) Since the *Apprendi* decision, some courts have introduced this new obligation on the federal government, *See e.g., United States of America v. Murphy*, 2000 WL 1140782 (D. Minn 2000) (*Apprendi* requires government to treat drug type and quantity as one of the elements of a drug conspiracy). The issue currently being examined by this Court is whether the above rule should apply to collateral attacks on convictions. Generally, the *Apprendi* rule does not apply retroactively to cases on collateral review such as the case at bar. *United States v. Sanders*, 247 F.3d 139, 146 (4th Cir.2001). *See United States v. Mandanici*, 205 F.3d 519, 527 (2d Cir. 2000). The Supreme Court in *Teague v. Lane*, 489 U.S. at 288 (1989) set up a three-step inquiry to determine when new rules of criminal procedure apply retroactively. *Id.* Those steps are: (1) the court must determine the date on which the defendant's conviction became final; (2) the court must decide whether the Supreme Court's ruling constitutes a "new rule" of constitutional criminal procedure; and (3) if the rule is new, then it does not apply retroactively unless it falls within one of the two exceptions to the general bar of retroactivity. *Id.* at 146-47. Under *Teague*, a "new constitutional rule of criminal procedure," should be applied retroactively,

> if it places "certain kinds of primary, private, individual conduct beyond the power of criminal law-making authority to proscribe." (citation omitted). Second, a new rule should be applied retroactively if it requires the observance of "those procedures that. ..are 'implicit' in the concept of ordered liberty."

Id. at 307. Thus, because the *Apprendi* principle is a "new constitutional rule of criminal procedure," Defendant is barred, under *Teague*, from raising it in his collateral attack unless he can meet one of two *Teague* exceptions.

Even assuming that the *Apprendi* claim was raised for the first time in a collateral proceeding, Defendant has demonstrated no valid reason for neglecting to raise the drug quantity issue on direct appeal. Defendant Pitt "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (Gov't Resp. to Pet'r's Mot. at 51.) Since Defendant cannot prove cause and prejudice, he must demonstrate that he is actually innocent to excuse the procedural default. *United States v. Mikalajunas*, 186 F.3d 490, 494 (4th Cir. 1999). This Court finds that because of the overwhelming evidence against Defendant he cannot and has not shown this Court that he is innocent. Thus, Defendant's claim must fail.

CONCLUSION

For the reasons previously stated, this Court will deny Petitioner's Motions for New Trial based on Newly Discovered Evidence, Motion for Discovery under 28 U.S.C. §2255, Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. §2255, and finally, Petitioner's Motion for Partial Summary Judgment on perjury and *Apprendi* Claims. The Court finds that Petitioner has failed to sufficiently demonstrate that his claims justify merit under §2255. Petitioner's motion to vacate his sentence on the grounds that his Fifth and Sixth Amendment Rights have been violated is denied. Similarly, this Court concludes that there is no violation of his right to effective assistance of counsel under the Sixth Amendment. Based on the above findings, the Court denies Petitioner's motion to vacate sentence pursuant to 28 U.S.C. § 2255 as to all his claims. Additionally, this Court believes that Johnny St. Valentine Brown's subsequent plea of perjury, in an unrelated case, would not change the jury's verdict of guilty in the above captioned case. There existed ample evidence from other witnesses that would have resulted in the same verdict for Mr. Pitt. Moreover, Mr. Brown's perjury testimony dealt only with his accreditations, however, he still was an experienced police officer in a narcotics unit, which formed the basis for his testimony. A separate order consistent with this opinion will follow.

8/31/01
Date

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-7880

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DONTE JAVON PITT,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge. (CR-96-36-AW, CA-00-1566-AW)

Submitted: March 14, 2002 Decided: March 22, 2002

Before NIEMEYER and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Fred Warren Bennett, Greenbelt, Maryland, for Appellant. Odessa Palmer Jackson, OFFICE OF THE UNITED STATES ATTORNEY, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Donte Javon Pitt seeks to appeal the district court's order denying his motion filed under 28 U.S.C.A. § 2255 (West Supp. 2001). We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we deny Pitt's motion for a certificate of appealability and dismiss the appeal on the reasoning of the district court. See United States v. Pitt, Nos. CR-96-36-AW; CA-00-1566-AW (D. Md. filed Aug. 31, 2001 & entered Sept. 4, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

May 29, 2002

No. 01-7880

CR-96-36-AW

CA-00-1566-AW

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DONTE JAVON PITT

Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
Clerk

Supreme Court, U.S.
FILED
NOV 18 2002

No. 02-319

In the Supreme Court of the United States

DONTE JAVON PITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly denied petitioner's application for a certificate of appealability under 28 U.S.C. 2253(c) with respect to petitioner's claim that he was convicted in violation of the Due Process Clause of the Fifth Amendment because, without the prosecutors' knowledge, a police officer gave false testimony about his own credentials at petitioner's trial.

2. Whether the court of appeals correctly denied petitioner's application for a certificate of appealability under 28 U.S.C. 2253(c) with respect to petitioner's claim that the district court was required to hold an evidentiary hearing on whether petitioner was denied effective assistance of counsel during plea negotiations.

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In the Supreme Court of the United States

No. 02-319

DONTE JAVON PITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam order of the court of appeals denying a certificate of appealability (Pet. App. 29a-30a) is not published in the Federal Reporter, but is reprinted at 30 Fed. Appx. 321. The memorandum opinion of the district court denying petitioner's motion under 28 U.S.C. 2255 (Pet. App. 1a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2002. A petition for rehearing was denied on May 29, 2002 (Pet. App. 31a-32a). The petition for a writ of certiorari was filed on August 26, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiring to distribute cocaine base, in violation of 21 U.S.C. 846, single counts of possessing cocaine base with intent to distribute it, possessing cocaine with intent to distribute it, and distributing cocaine base, all in violation of 21 U.S.C. 841(a)(1), one count of using a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c), and one count of being a convicted felon in possession of a firearm, in violation of 18 U.S.C. 922(g). 6/2/97 Judgment 1, 1.01. The court of appeals affirmed in an unpublished decision, *United States* v. *Pitt*, No. 97-4420, 1999 WL 25552 (4th Cir. Jan. 22, 1999) (noted at 172 F.3d 45 (Table)), and this Court denied certiorari, 526 U.S. 1151 (1999).

The district court denied petitioner's motion for post-conviction relief under 28 U.S.C. 2255. Pet. App. 1a-28a. The court of appeals denied petitioner a certificate of appealability under 28 U.S.C. 2253(c). Pet. App. 29a-30a.

1. On March 25, 1995, police officers responded to a burglar alarm at a house in Temple Hills, Maryland. The officers smelled natural gas and called the fire department. The firefighters and police then entered the house to address the apparent danger. In the house, the police saw what appeared to be cocaine and materials used for producing cocaine base (crack). The officers obtained and executed search warrants. They discovered evidence of a drug manufacturing and distribution operation, including 16 trash bags containing a total of 512 wrappers for kilograms of cocaine, 202 empty baking soda boxes, 77 plastic bags with cocaine

residue, 178 grams of cocaine base, 363 grams of cocaine, approximately $2000 in cash, two semi-automatic handguns, and various documents. In a safe, the officers discovered two kilograms of cocaine, approximately $300,000 in cash, and three more semi-automatic handguns. Pet. App. 2a-3a.

Documents discovered in the house connected petitioner to an apartment in Temple Hills, which officers searched with the consent of the building's management after the apartment was vacated by the tenants. The search resulted in the recovery of a microwave oven containing crack residue, 23 grams of crack, two grams of cocaine powder, and petitioner's fingerprints on items in the apartment. 97-4420 Gov't C.A. Br. 3-4.

2. At petitioner's trial, government testimony about an exchange of crack for guns linked petitioner to two of the handguns seized from the house in Temple Hills. Petitioner's fingerprints were found on several items seized from the house, including boxes of baking soda, a plastic bag containing crack residue, and several juice bottles. A government handwriting expert testified that petitioner's handwriting matched handwriting and signatures on papers found in the Temple Hills house and on several documents signed by "Robert Watson," including the lease for the house, the application for the house's security system, and a service contract for the house. Two witnesses who provided services at the house identified petitioner. The house's telephone service was installed in the name of petitioner's sister; the security-alarm company was given the phone numbers of petitioner's brother and sister as contact numbers; and the password for the alarm system was the name of petitioner's mother. 97-4420 Gov't C.A. Br. 3.

Also at petitioner's trial, the government presented a retired detective of the Metropolitan Police Department in Washington, D.C., Johnny St. Valentine Brown, as an expert witness on the street drug trade, including crack manufacturing and distribution techniques. Detective Brown's qualifications as an expert witness included 21 years in the narcotics and drug investigations division of the Metropolitan Police, of which five years were spent as an undercover investigator. Pet. App. 4a-5a. Detective Brown received relevant training from several organizations and institutions, including the Drug Enforcement Agency and the United States Customs Service. *Id.* at 4a. Brown testified, in addition, that he was a licensed pharmacist, had a bachelor's degree, master's degree, and doctoral degree from Howard University, and had been a congressional aide. *Ibid.*

After the jury returned its guilty verdicts, the district court sentenced petitioner to 240 months' imprisonment on the drug-possession and drug-distribution charges, 60 months' imprisonment (to be served consecutively) for using a firearm during a drug-trafficking crime, and 120 months' imprisonment (to be served concurrently with the 240-month sentence) for possessing a firearm. 6/2/97 Judgment 2.

3. In January 1999, the court of appeals affirmed petitioner's convictions on direct appeal. The court of appeals rejected petitioner's claims that the district court erred by: failing to suppress evidence seized from the Temple Hills house (see 1999 WL 25552, at *3); admitting testimony that identified petitioner as the lessee of the Temple Hills house and established his involvement in the drugs-for-guns swap (see *id.* at *4-*5); failing to admit certain evidence that the defense offered or suggested it might offer (see *id.* at *4-*6);

replacing a juror (see *id.* at *6-*7); and failing to declare a mistrial in light of possible efforts to contact or intimidate jurors (see *id.* at *7). The court of appeals also rejected petitioner's argument that there was insufficient evidence to convict him on the drug-conspiracy count, finding "ample evidence" to support that conviction. *Id.* at *8. Petitioner did not raise in his direct appeal any of the issues that are presented in his current petition for certiorari.

4. Later in 1999, it was discovered in another case that, contrary to Detective Brown's testimony at petitioner's trial and in other proceedings, Brown was not a licensed pharmacist and does not hold degrees from Howard University. In February 2000, Brown pleaded guilty to perjury for making false statements about his credentials while under oath. Pet. App. 7a.

5. In May 2000, petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255, arguing in relevant part that his drug-trafficking convictions were obtained through the government's use of Brown's perjured testimony, in violation of the Fifth Amendment, and that his trial counsel was constitutionally ineffective during plea negotiations. In August 2001, the district court denied petitioner's Section 2255 motion. Pet. App. 1a-28a.

On the perjured-testimony claim, the district court determined that, even if jurors had completely disregarded Brown's testimony, petitioner "still would have been convicted on the basis of overwhelming evidence against him," and "the jury's judgment would not have been different in any way." Pet. App. 20a. The district court explained that other witnesses testified to many of the same facts as Brown, and the physical evidence against petitioner included "cash, crack manufacturing components and ingredients, scales, loaded firearms,

500 kilogram wrappers, crack residue laden plastic bags, and other perfunctory [*sic*] drug distribution and production devices." *Id.* at 21a. The district court noted, in addition, that Brown's false academic and pharmaceutical credentials were not the basis for his trial testimony about the drug trade. Instead, that testimony was based on Brown's street experience as a police officer (*ibid.*), which petitioner has not disputed.

The district court also rejected (Pet. App. 15a-16a) petitioner's argument that his trial counsel was constitutionally ineffective for inadequately advising petitioner about the possible sentence he would get if he pleaded guilty. The court determined that petitioner "was fully advised of the penalties, whether he chose to plea or go to trial and face sentencing." *Id.* at 15a. The court explained that the decision whether to accept a plea agreement was correctly left to petitioner (*id.* at 15a-16a), and that trial counsel performed adequately in attempting to negotiate a plea agreement for petitioner (*id.* at 16a).

6. Petitioner filed a notice of appeal. In March 2002, the court of appeals issued a per curiam decision treating petitioner's notice of appeal as a motion for a certificate of appealability under 28 U.S.C. 2253(c), denying that motion, and dismissing the appeal. Pet. App. 29a-30a.

ARGUMENT

When a district court denies a motion for collateral relief under 28 U.S.C. 2255, "[a] certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). To obtain a certificate of appealability, the petitioner must show "that reasonable jurists would find the district court's assessment of

the constitutional claims debatable or wrong." *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000). Petitioner cannot make that showing in this case.

1. Petitioner argues (Pet. 6-13) that this Court should grant certiorari to decide whether knowledge of Brown's false testimony should be attributed to the prosecution in petitioner's case, notwithstanding the conceded absence of any indication that the prosecution actually knew of Brown's perjury (see Pet. 9). Petitioner states that a conviction obtained through the prosecution's knowing use of perjured testimony violates due process "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" (Pet. 7 (quoting *United States* v. *Agurs*, 427 U.S. 97, 103 (1976)), and he maintains (Pet. 11-13) that such a likelihood exists in his case.

Petitioner notes (Pet. 8-9) that there is a narrow circuit split about when knowledge of a law enforcement officer's perjured testimony must be imputed to the prosecution. Compare *Boyd* v. *French*, 147 F.3d 319, 329 (4th Cir. 1998) ("[K]nowingly false or misleading testimony by a law enforcement officer is imputed to the prosecution."), cert. denied, 525 U.S. 1150 (1999), with *Koch* v. *Puckett*, 907 F.2d 524, 531 (5th Cir. 1990) (rejecting due process claim based on alleged perjury by sheriff and government investigators where habeas petitioner "does not allege that the prosecution knew that this testimony was false"), and *United States* v. *Bailey*, 123 F.3d 1381, 1397 (11th Cir. 1997) (no due process violation where prosecutor did not know of investigating agent's perjury and defendant did not show that perjury affected his conviction); see *Smith* v. *Secretary of N.M. Dep't of Corrs.*, 50 F.3d 801, 831 (10th Cir.) (upholding district court determination that prosecution did not knowingly allow witness to testify under

false name, although government investigator was aware of witness's true identity), cert. denied, 516 U.S. 905 (1995). This case, however, does not present an appropriate vehicle for considering whether to resolve that limited disagreement.

a. Petitioner's claim of a circuit split depends on the Fourth Circuit's adherence to the rule that "knowingly false or misleading testimony by a law enforcement officer is imputed to the prosecution." *Boyd*, 147 F.3d at 329. Petitioner cites no case of any other circuit that states a similar rule. Yet petitioner asserts that the district court in this case *failed* to apply the Fourth Circuit's rule. See Pet. 8-10. At most, therefore, the Fourth Circuit's failure to issue a certificate of appealability in this case indicates the possibility that its own law is unsettled, which undermines, rather than supports, petitioner's assertion that this Court should grant certiorari to resolve a circuit conflict.

b. Petitioner failed to raise his due process claim on direct appeal. Petitioner therefore was barred from raising that claim in his Section 2255 motion unless he could "first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley* v. *United States*, 523 U.S. 614, 622 (1998) (internal citations omitted).[1]

Petitioner cannot show cause for his procedural default. As the district court observed (Pet. App. 8a-9a); the government provided petitioner with Brown's ré-

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[1] The government did not rely on the default in the lower courts. Nevertheless, the default is relevant to whether this Court should exercise its discretion on certiorari review. See Sup. Ct. R. 10; cf. *Trest* v. *Cain*, 522 U.S. 87, 90 (1997) (declining to decide "whether, or just when, a habeas court *may* consider a procedural default that the State at some point has waived, or failed to raise").

sumé in advance of trial, and petitioner had an opportunity to investigate Brown and to discredit his testimony at the trial. See *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986) ("[T]he existence of cause for a procedural default must ordinarily turn on * * * some objective factor external to the defense.").

Petitioner also cannot establish actual prejudice from Brown's false testimony. As the district court discussed (Pet. App. 8a, 20a-21a), Brown's perjured testimony about personal facts such as his academic and pharmaceutical credentials[2] does not cast doubt on Brown's expertise in the street drug trade, which Brown acquired during more than two decades in the Metropolitan Police's narcotics division. Furthermore, and as the district court also determined (*id.* at 20a-21a), the government presented "overwhelming evidence" (*id.* at 20a) at trial to convict petitioner of the drug-distribution offenses, and it would have made no difference to the jury's verdict if Brown's testimony had been entirely disregarded.

Petitioner's procedural default likewise cannot be excused under an "actual innocence" theory. For the reasons discussed above and in the next paragraph, petitioner cannot demonstrate "that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him" (*Bousley*, 523 U.S. at 623 (citation and quotation marks omitted)) if Brown had not provided false testimony.

c. Petitioner's due process claim fails on its merits, because there is no "reasonable likelihood" that Brown's false credentials "could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103. Brown

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[2] Contrary to petitioner's claim (Pet. 4), Brown correctly stated his full name during his trial testimony. See 10/25/96 Tr. 8.

testified about the manufacture and distribution of street drugs—not the particular facts of petitioner's case (see 10/25/96 Tr. 13, 29-30)—and his expert knowledge of the drug trade was established independently of his false credentials. Even if the jury had disregarded Brown's entire testimony, other evidence at trial, such as the 512 discarded wrappers for kilograms of cocaine, the plastic bags with cocaine residue, the cash seized at the Temple Hills house, petitioner's fingerprints, and his involvement in obtaining the lease and security system for the house, overwhelmingly established that petitioner's drug crimes amounted to more than "personal possession" (Pet. 12). See pp. 2-3, *supra* (discussing evidence). Petitioner appears to concede that Brown's testimony was not necessary for the government to establish that the Temple Hills house was used "in large scale drug trafficking." Pet. 12. The trial judge, moreover, observed during the trial that, in his view, Brown's testimony about the drug trade was not "necessary" for the government to prove its case and might be "too much" evidence. 10/25/96 Tr. 31.

Because the court of appeals' denial of a certificate of appealability on petitioner's due process claim does not implicate any clear circuit split, and because the underlying due process claim was procedurally defaulted and lacks merit, this Court's review is not warranted.

2. Petitioner also contends (Pet. 14-20) that the district court was required to hold an evidentiary hearing on his Section 2255 motion because there was a material factual dispute about whether trial counsel provided effective assistance during plea negotiations. Section 2255 directs that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall * * * grant a

prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. 2255. Petitioner's argument (Pet. 17-20) is that his Section 2255 motion presented facts about his discussions with trial counsel that the government contradicted and, therefore, an evidentiary hearing was required to allow the district court to make a "credibility determination."

In his declaration supporting the Section 2255 motion, petitioner averred that his lead trial counsel advised that a government plea offer "would probably" result in a prison sentence of approximately 12 years, and that petitioner was prepared to accept the offer until another attorney suggested that, under the plea agreement, "there was a risk of a much higher sentence." Ex. Binder for Sec. 2255 Pet., Tab 6, paras. 4-5; see *id.* para. 10 (alleging that counsel advised "that the drug amount * * * was still a problem" in later plea proposal). In response, the government provided the district court with an affidavit of petitioner's lead trial counsel, who stated that he and the other attorney told petitioner that the judge would not be bound by the sentence that the government estimated as part of its plea offer, and that the judge "could enhance the sentence" in light of the 512 cocaine wrappers found at the Temple Hills house. Gov't Opp. to Def.'s Mot. to Vacate Sentence Pursuant to 2255, Ex. A at 1. Based on those affidavits and other record documents, the district court determined that petitioner was advised of the possible penalties if he pleaded guilty and if he proceeded to trial, that trial counsel did not attempt to persuade petitioner to take the plea or reject it, and that petitioner's counsel acted in accordance with their professional responsibilities. Pet. App. 15a-16a.

The district court resolved petitioner's ineffective-assistance claim on the basis of *uncontested* facts, about which petitioner and his trial counsel do not disagree. Petitioner, moreover, has not shown how counsel's warning about the possibility of an enhanced sentence after a plea agreement violated his Sixth Amendment rights.[3] See *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984) (to demonstrate Sixth Amendment violation, petitioner must show both deficient performance and prejudice from the deficient performance). The court of appeals correctly denied petitioner a certificate of appealability on the ineffective-assistance issue, and that denial raises no question that warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2002

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[3] Petitioner does not argue that his trial counsel provided legally erroneous advice or unreasonably suggested the possibility of a sentence enhancement. Instead, petitioner faults counsel for raising the possibility of an enhanced sentence during plea negotiations because, after a trial on all counts, petitioner's drug-distribution sentence ultimately was not enhanced. See Pet. 18.

(3)

No. 02-319

Supreme Court, U.S.
FILED
DEC 4 2002
OFFICE OF THE CLERK

In The Supreme Court of the United States

DONTE PITT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO THE UNITED STATES' OPPOSITION TO GRANTING THE WRIT

Petitioner files this reply to address three of the United States' contentions which are either unsupported by the factual record or which arise from an incomplete reading of the record.

1. The United States contends this Court should not grant a writ of certiorari because resolving the split in the circuits, regarding the degree to which knowledge of a law enforcement witnesses' perjury is attributed to the prosecution, would not change the outcome of this case. It contends that if the circuit split were resolved in Petitioner's favor by attributing the perjury of the United States' expert witness, Johnny St. Valentine Brown, to the prosecution, Petitioner would still not be entitled to relief because the expert's testimony was immaterial to the jury's verdict. Opposition at pp. 9 - 10 (contending that St. Valentine Brown's perjury could not have affected the jury's verdict). However, the United States' claim is unsupported by the record. Applying the proper materiality standard to evaluating the impact of the expert's perjury on the jury's verdict would compel relief in this case. The proper standard advocated by Petitioner and applied by the Fourth Circuit in *Boyd v. French*, 147 F.3d 319, 329-330 (4th Cir. 1998), and *United States v. Kelly*, 35 F.3d 929, 933 (4th Cir. 1994), requires a new trial if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Petition at pp. 7 - 8.

No court has ever applied the correct standard to evaluating the effect of the expert's perjury on the verdict in this case. If a court does apply the right

standard, it will require a new trial. The United States mistakes the substantial trial evidence that someone was engaged in drug trafficking at the residence police searched in Temple Hills, Maryland, with the evidence that Petitioner personally conducted a large scale drug trafficking operation there. The United States did not need the expert's testimony to show that the residence was used to process large amounts of crack cocaine. However, in a case where it had no informant or co-conspirator testimony regarding drug processing at the residence, and where many other people had access to and spent time in the residence, the United States desperately needed the expert's testimony to connect Petitioner to the drug operation itself and not merely to the residence through a lease.

The expert's testimony provided the Government's crucial link between Petitioner and the drug processing operation as only his testimony connected Petitioner to items in the residence which the expert testified were used for processing narcotics. Furthermore, the credibility of the expert's testimony connecting the items to Petitioner relied on the expert's bogus academic credentials relating to production of narcotics, not solely on the expert's street knowledge.

The United States recognized the critical importance of the credentialed narcotics expert's testimony to its proof by insisting that the District Court allow the jury to hear his testimony. 10/25/96 T. 27-31. When defense counsel challenged the relevance of the expert's testimony, the Government told the District Court at trial that "we think it's very necessary for the jury to understand the process [of producing crack] and

how it gets here." 10/25/96 T. 28. "He's [the expert] going to testify about manufacturing." 10/25/96 T. 29. The AUSA told the District Court that the expert's testimony was "very relevant to the $300,000 that was found in the house, 200 boxes of baking soda, the residue that was found." 10/25/96 T. 27. The AUSA also told the district court that the expert would "testify about the chain [of distribution]. He's going to testify about manufacturing. He's going to testify about protection measures... all these things are relevant based on everything that was found in the house." 10/25/96 T. 29-30.

Contrary to the United States' claim, the expert's testimony was essential to the Government's proof. Since there is a reasonable likelihood that the expert's testimony could have affected the judgment of the jury, determining the proper materiality standard is vital to the outcome of this case, and once applied to the facts the proper standard will compel a new trial.

2. The United States claims that procedural default bars relief on the expert perjury claim. Opposition at pp. 8 - 9. Ignoring its role and responsibility in presenting perjured testimony by the expert in many cases year after year, including Petitioner's case, the United States faults Petitioner's trial counsel for not catching its' own expert witnesses' perjury earlier. Id. It cites no authority that the defense is required to extract prior to trial, from nonpublic records using subpoenas, evidence pertaining to the credentials of the United States' expert witness. The United States had the burden of eliciting truthful testimony from its expert, and the burden was not on the defense to discover

prior to trial that the United States had routinely offered false testimony from its expert.

In addition to the oddity of the United States' claim that the defense should have blown the whistle on perjury by its expert earlier than it did, this Court should in its discretion decline to address an alleged procedural default in deciding whether to issue the writ.

First, as a consequence of the United States' failure to litigate this issue below, there is no evidentiary record regarding any alleged procedural default. There is no evidence in the post conviction record that, as the United States claims, "petitioner had an opportunity to investigate Brown and to discredit his testimony at trial." Opposition at p. 9. There is no evidence of when the expert's resume was received by trial counsel. There is no evidence that given the United States' use of that expert in case after case before Petitioner's trial that investigating the expert's credentials prior to trial would have been a reasonable step for trial counsel to take. The expert's perjury was discovered in unrelated civil litigation in the District of Columbia after the verdict in this case when his credentials were investigated in connection with civil discovery. Civil discovery offers far more effective means of investigating an expert's credentials than do the Federal Rules of Criminal Procedure. Thus, there is no proper factual basis on which to find procedural default.

Second, if as the United States blithely contends, discovering the expert's perjury would have been so easy, then surely the United States would have uncovered the expert's perjury long ago and avoided the ensuing debacle with the witnesses' perjurious testimony.

Third, as the United States admits, Opposition at p. 8 n. 1, it failed to properly raise and preserve a procedural default claim below. The United States should not be permitted to sandbag the judicial system and raise on appeal before this Court issues it failed to fully litigate below before the District Court or the Fourth Circuit. *See* Steagald v. United States, 451 U.S. 204 (1981).

For these reasons, this Court should in its discretion decline to address the Government's claim that procedural default bars the claims arising from the expert's perjury.

3. The United States contends that this Court should not grant a Writ of Certiorari because the District Court properly denied an evidentiary hearing on Petitioner's claim that trial counsel provided ineffective assistance of counsel regarding plea offers. Opposition at pp. 10-12. The United States claims that there was no material question of fact to be decided at an evidentiary hearing on this issue, and that the District Court denied a hearing based on undisputed facts. Id. The United States is wrong that differences between Petitioner and the United States on this issue were immaterial, justifying denial of an evidentiary hearing.

Petitioner's affidavit, Ex. 6 to his Section 2255 Petition, stated that but for the advice he received from trial counsel that his sentence could be enhanced beyond approximately 12 years incarceration due to hundreds of cocaine wrappers found in the Temple Hills residence, he would have accepted the United States' plea offer. Ex. 6 to Section 2255 Petition. On the other hand, based on the contradictory affidavit of trial counsel, the United

States argued to the District Court that "[t]he record indicates that Pitt wanted no part of a plea agreement." Government's Opposition to Defendant's Motion to Vacate Sentence Pursuant to 2255, filed October 5, 2000, at p. 29; see also id. at Ex. A (Affidavit of trial counsel Kenneth Robinson claiming that Petitioner rejected offer providing for a guaranteed cap of five years, avoiding issue with drug wrapper enhancement).

The contrast between these two factual claims could not have been clearer. Petitioner contended that absent trial counsel's advice regarding the possibility of an enhanced sentence, he would have pleaded guilty to a charge carrying more than ten years incarceration, while trial counsel claims Petitioner declined a proposal providing for no more than five years incarceration and no risk of a higher sentence. The District Court, and by adoption the Fourth Circuit, held on the affidavits alone that the Government claims were more persuasive. Memo. Op. at 13 (App. 15a) ("this Court believes it is clear from the record's documentation of correspondence between trial counsel and the Government, that trial counsel had performed adequately in attempting to negotiate a plea agreement"). This factual finding of the District Court is clearly related to the disputed facts because if, as trial counsel and the United States contend, Petitioner was uninterested in any plea offer, even one offering as few as five years incarceration, the advice Petitioner received regarding a plea offer providing for more than ten years incarceration could not have been ineffective.

In addition to erroneously claiming that there were no differences between the Petitioner's and the United States' material facts regarding the plea offers, the United States also claims that "Petitioner does not argue that his trial counsel provided legally erroneous advice or unreasonably suggested the possibility of a sentence enhancement." Opposition at p. 12 n. 3. Petitioner's issue for this Court set forth in the Petition is the trial court's error in denying an evidentiary hearing on a disputed question of fact, not the disputed question of fact itself which is implicit in the question presented to this Court. The underlying ineffective assistance of counsel claim, which cannot be resolved without an evidentiary hearing, is that "[t]rial counsel inadequately advised Mr. Pitt regarding the possible sentence he would receive following entry of a guilty plea in response to the Government's two (2) plea offers." Amended Section 2255 Petition filed September 6, 2000, at p. 7. In support of this claim, Petitioner would show at an evidentiary hearing that it was objectively unreasonable, based on local practice in the District Court, for trial counsel to tell Petitioner that there was any risk that the Probation Office or the District Court would go beyond a negotiated stipulation on drug quantity. At a hearing Petitioner would show that with a plea agreement and stipulated facts there would have been no evidence in the case for the Probation Office or the District Court to rely on in rejecting the drug quantity set forth in the proposed plea agreement.

The United States' argument appears to be that the Petition did not set forth all of the details of the ineffective assistance of counsel claim which should

have been resolved in an evidentiary hearing. Petitioner properly framed the question before this Court, which is the circumstances in which an evidentiary hearing is required on a Section 2255 claim involving disputed material facts. The absence of a full discussion of the plea agreement claim in the Petition does not waive any aspect of the underlying claim that trial counsel misadvised Petitioner on the plea offers.

CONCLUSION

For the foregoing reasons, Petitioner Donte Pitt respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. This is the proper case to address the two compelling issues raised in the Petition: the circumstances for the purposes of post conviction relief in which knowledge of a police officer's perjury is imputed to the prosecution, and the circumstances in which a District Court must conduct an evidentiary hearing to resolve an ineffective assistance of counsel claim.

Respectfully submitted,

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